#L-1011

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04/28/87

Fourth Supplement to Memorandum 86-201

Subject: Study L-1011 - Opening Estate Administration (Additional Comments on Tentative Recommendation)

Attached to this memorandum is a letter from the State Bar Team 3 commenting on the tentative recommendation relating to opening estate administration and on the other comments we have received on this subject. At the meeting we will orally take up the points raised in the letter in connection with the matters to which they relate.

We have also received a letter from Charles A. Collier, Jr., attached to the Minutes of the April 1987 meeting. Mr. Collier raises two points in the letter that relate to opening estate administration:

§ 8121. Publication of notice. In subdivision (b), if there is no newspaper of general circulation published in the city where the decedent resided or property is located, the notice is to be published in a newspaper published in the appropriate county which is circulated within the "community" of residence or property location. Mr. Collier questions the propriety of this term. "Should it not refer to the 'area of the county' in which the decedent resided?"

§ 8463. Surviving spouse. Existing law lowers the priority of a an estranged spouse for appointment as administrator if a dissolution proceeding was pending at the time of the decedent's death, unless the estranged spouse waives certain rights. Mr. Collier suggests that the waiver should be required to be more extensive than under existing law. We need not address this point, since under the Commission's current draft in Section 8463, the estranged spouse is given lower priority regardless of waivers.

Respectfully submitted,

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April 8, 1987

BY FEDERAL EXPRESS

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Re: Memorandum 86-201: Opening Estate Administration

Dear Jim:

On behalf of Team 3, Neal Wells and I reviewed Memorandum 86-201 and its three supplements in anticipation of the Law Revision Commission Hearing on April 10. The following are our comments:

Section 8002: Contents of Petition for Probate. We don't think it is necessary for the attorney to sign the petition. However, the comment seems to imply that the attorney may verify the petition if the petitioner is not available. The Executive Committee determined not to support attorney verifications in as broad a manner as is permitted by Code Civ. Proc. § 446. See Chuck Collier's letter of December 10, 1986, re Memorandum 86-91.

We do not think it is practical to require typing of all copies but agree that this would be an appropriate request for holographic wills.

Finally, a petition for probate is itself testimony that there is no later will or other will; it is testimony that the will offered is the controlling document. This additional statement could have us provide clearly superseded wills, of which there are often times many. Indeed, the execution of a new will is often to protect the history of changes from public view. It would seem that disclosure of knowledge of prior wills can only lead to inquiry as to what they say, whether relevant to the proceedings or not.

Section 8004: Continuance on opposition. Do you want to consider the additional ground of time to consider the filing of an objection? Sometimes an heir needs a two to three week continuance to consider whether to file objections. We would not want to force the heir to commit in advance to filing objections to get a continuance. Also, why is the cross-reference not to Section 8200, rather than 8210, for the notice required?

Section 8005: Hearing on Petition. We have reference to both domicile and residence. We should have a single concept--residence--for consistency.

Section 8006: What are the jurisdictional facts? Section 8005 simply refers to facts "including" place of death and domicile. Also, the last phrase of (b) should probably be "or an order resulting from any subsequent proceeding."

Section 8007: "Any" should be "either" in (b).

Section 8100: Form of notice. The reference in the notice to "California Estate and Trust Code" should be changed to "California Probate Code." We disagree with the comment that a copy of the will be sent. A person with a legitimate claim has a certain duty to enforce it. Sending the will tells the creditor nothing about the assets available to fund his or her claim. Contingent heirs thus may discern a potential future gift under a surviving spouse's will. Further, intestate heirs are frequently quite remote. If they have an interest they may request a copy or follow up. Finally, copying costs, depending on the number of creditors and heirs, could be excessive. In sum, a will, although publicly available, should not itself be "published."

Section 8110: Requirement of notice. With respect to Judge Willard's comment, again the question of number of prior wills arises, with the potential of defeating the client's privacy with respect to various (and usually legitimate) changes in his or her dispositive plan. We believe the policy of avoiding this problem outweighs the cases of abuse that would be uncovered by a change. The Executive Committee favors a uniform switch to 15-day notice for all probate matters in line with the staff conclusion in the third paragraph of notes. A uniform notice procedure of 15 days would avoid confusion.

Section 8113. Notice involving foreign citizens. In practice in Los Angeles County, we have placed reliance on the legal newspapers as to whether there is consul representation and whether there are treaty rights. We believe this would be the effect statewide if it were included in the Code. If that is acceptable to the Commission, fine. As a further question, there is no definition in the policy memo or the proposed statute as to what treaty rights are. Do we know? We recommend inclusion of the statute, however, because we believe it may facilitate in some cases the transfer of a gift and it may in some cases ensure that the beneficiary actually gets the gift.

Sections 8125, 8126: Do we still have "affidavits" under California law? Should this not be "declaration"?

Section 8200. Delivery of Will by custodian. The Note indicates the sections will be amended to provide that a copy will be furnished by the clerk. However, the production requirement might benefit from some clarification on procedures. The statute could be clarified to say that the clerk will provide the copy to the petitioner. Perhaps Commissioner Stodden will have some additional comments as to how this might work.

Section 8202: Will outside jurisdiction. Again, these sections of the code should refer to residence.

Section 8220: Again, perhaps "affidavit" should be "declaration."

Section 8226: Admission of Will to probate. The comments to this section suggest that former problems have been satisfactorily cured or addressed. However, how does this Section relate to 8007? An admission is also a jurisdictional determination. Perhaps 8226 should say, "Except as provided in Section 8007(b)."

Section 8250: Summons. Does the switch from summons to citation affect the response required? We have represented clients who chose not to answer a contest citation but stood on the sidelines. Does the failure to answer a civil summons provide this kind of flexibility, or does it mean that the failure to answer would give rise to a finding that the objections are valid? For example, would the party summoned who failed to answer have a default entered (with all the default "trappings," including affidavit of non-military service and notice to the party)? Would the party defaulted be precluded from sharing in a will admitted in the contest proceeding? We want it to be clear the "summons" label does not change existing law, otherwise we foresee serious problems. The additions suggested in the Staff comment should be made.

Section 8251: Responsive pleading. Do we want to consider 15 days to get uniformity of our notice periods? Also, we agree with the comment that 10 days is too short a time for amendment to the objection. In Los Angeles County, for example, we understand that the court cannot allow a continuance (apparently for a reason related to its computer system) that is less than two weeks. If the demurrer is overruled, shouldn't the "may answer" be changed to "shall answer"? And, if not answered, what is the required determination?

Section 8270: Perhaps the reference to "close of administration" in (b) should be "Entry of order of final distribution."

Section 8271: Proceedings in revocation. Again, does this switch to summons require a procedural response that if not made justifies an automatic revocation?

Section 8273: Attorneys fees and costs in revocation. With rare exception, the Executive Committee has not favored the awarding of fees to the successful party.

Section 8401: Placement of property in controlled account. We believe we did some definitional work on this for other legislation. It is not enough that the institution be insured. Instead, the account must be within a limit that is also insured. The Note says the staff is working with the definitions of institutions. Hopefully they will also treat the limitation of the amount of the account. In (b), "authorization" should probably be "order."

Section 8403: Oath. The Note provides for a welcome and much-needed change. No need to have the Petitioner sign the probate-related documents on two separate occasions.

Section 8404: Instructions to fiduciaries. This is required in Los Angeles County and the concept is certainly a good one. We believe the clerk need not deliver the instructions. In addition, and more importantly, we are concerned that the instructions not be construed to interpret current law. For example, they indicate a referee's appraisal must be obtained while in fact a court waiver could eleminate this requirement. We would like to see as part of the Comment a statement that the text does not interpret other sections of the Code. Finally, our current code refers to "Appraisement" but we believe this may in the new provisions have been changed to "Appraisal" as referenced in the Instructions.

Section 8408: Selection of attorney. We strongly recommend against inclusion of this section. This is properly left to the administrator in the performance of his or her duties and is a matter of business judgment. What does the requirement that the relationship be considered add? The decedent named as executor a person in whom he or she had confidence. To allow beneficiaries to play a role in such judgments is to thwart that aspect of the decedent's intent. Further, will the statute be grounds for later surcharge or elimination of fees once the work has been satisfactorily performed? Is it grounds for beneficiaries to advocate a lawyer different from that selected?

Section 8441: Priority for appointment. We agree with both additions specified in the Note.

Section 8442: Authority of administration with Will annexed. Again, I agree with the addition specified in the Note.

Section 8461: Periods should appear after "Other issue" and "Parents."

Section 8463: Priority of surviving spouse. We believe the statute specifically concerning the surviving spouse is necessary. The real question is whether the disqualification of the spouse in this situation should be automatic, as with the statute, or should require further action by others interested in the estate, as in the solution proposed by Ms. Bertucio. We believe the problems involved require the former, rather than the latter. The alternatives proposed would create a fight even before the probate were opened. Not a good way to open a probate.

Section 8465: Notice of person entitled to appointment. "Issue" should probably be corrected to "more remote issue."

Section 8466: If a relative entitled to priority is also a creditor, that priority should be preserved nontheless. Compare Section 1820 of the Conservatorship provisions, which expressly preserves the standing of relative/creditor to file a petition.

Section 8467: Equal priority. We suggest that the last phrase, allowing appointment of a disinterested person, should come out and be replaced with "the court need not make any appointment in that class of priority." This would at least drop the court down to the next level of priority, a better result perhaps than a "disinterested" person.

Section 8480: We are no experts in the subjunctive, but (b) should probably say "shall be conditioned on the personal representative's faithful execution of the duties of the office according to law..."

Section 8481: Waiver on bond. The real issue here is the extent to which creditors should be protected. So far as a beneficiary is concerned, if the

decedent did not want the estate to be protected, this should stand. We imagine that the solution presented in paragraph (3) to the note is one that could be attained by negotiation anyway. The protection of creditors is more serious, however, and we believe is the concern of our Los Angeles County judges when they impose bond even though waived. This is serious because the creditors claim period barring claims does not run until far after the hearing has been held. We would support permissive imposition of a bond in the form contained in (c).

Section 8486. Bonding fee. We agree that the deletion of the statutory fee for bond should be eliminated. If the fee and the market rate become inconsistent (as we've seen with interest rates, etc.) it would generate a petition in every bonded probate until such time as the law can be amended. We have this often enough, it seems.

Section 8502: Removal of personal representative. Jeffrey A. Dennis-Strathmeyer's comment that a representative could be appointed for special tasks is indeed interesting. However, we question whether the administrative costs of such a mechanism justify it.

Section 8523: Is not the appointment of a special administration "temporary" by nature?

Section 8545: Powers of special administrator. We agree with the suggestions made in the first two paragraphs of the Note, and with the conclusion of the staff in the next few paragraphs. An addition to the notes to the section would be quite helpful.

Section 8571: "Determines" should probably be "finds."

Sincerely,

Anne K. Hilker

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